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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-6

HILMAR G. MOORE, et al.,
Appellants

v.

JOHN PLEASANT SIMS, et al.,
Appellees

On Appeal From The United States District Court For The Southern District Of Texas, Houston Division

BRIEF AMICUS CURIAE OF EAST TEXAS LEGAL SERVICES, INC.

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BRIEF AMICUS CURIAE OF EAST TEXAS LEGAL SERVICES, INC.

QUESTIONS PRESENTED ON APPEAL

I.

Whether Equitable Restraint and Comity Required Abstention?

II.

Whether a Case or Controversy Existed?

III.

Whether the Challenged Portions of the Child Abuse Statutes are Unconstitutional?

INTEREST OF THE AMICUS

East Texas Legal Services, Inc., is a federally funded non-profit corporation that provides legal representation to low income people residing in fifteen counties in rural Deep East Texas. Attorneys for East Texas Legal Services currently represent, and have represented, many people affected by the Texas statutory scheme for addressing the problem of child abuse declared Constitutionally deficient by the District Court below. Our clients include parents faced with the involuntary modification and termination of their parental rights and children whom we represent as *ad litems* in suits affecting the parent-child relationship.

East Texas Legal Services began seeing clients in February of 1978, and consequently our clients have been able to avail themselves of the protections provided by the District Court in *Sims v. State Department of Public Welfare,* 438 F.Supp. 1179 (S.D. Tex. 1977). We have found that the state courts in the vast rural geographic areas our attorneys cover have been able to effectively administer Texas law in the field of child abuse consistent with the *Sims* constitutional protections for both parents and children.

Our experience has demonstrated that Texas' policy for protecting its minor citizens has not been frustrated by the District Court's insistence that the State adhere to constitutionally permissible procedures. East Texas Legal Services feels that this Court should be apprised of the fact that the State has been able to implement its policy in rural East Texas despite its claim that the rural nature of much of Texas renders implementation of several of the District Court's mandates impracticable. The State's claim unduly denigrates the rural Texas bench and bar.

The District Court's requirements have proven no more difficult to satisfy by the State Courts in East Texas than have constitutional requirements set by this Court in the areas of criminal, juvenile, and prejudgment seizure law. Judges are available in rural East Texas to issue emergency orders and to hold hearings, and attorneys are available to act as *ad litems*. We feel certain that the legal services programs covering other rural areas of this state including West Texas Legal Services, Texas Rural Legal Services, Central Texas Legal Services, and Gulf Coast Legal Services share our experience.

East Texas Legal Services, Inc., submits this brief because it strongly believes that the Texas statutory scheme successfully challenged by appellees was fraught with procedural and substantive defects of constitutional magnitude, and that the District Court's granting of equitable relief has substantially remedied these defects. The resultant effectuation of the state's sound policy in protecting children from abuse and neglect has shown the District Court's sensitive approach to the interests of both the state and its citizens to be consistent with the highest standards of the United States' system of federalism. For these reasons, East Texas Legal Services, Inc., respectfully submits this Brief *Amicus Curiae*.

STATEMENT OF THE CASE

The civil action was brought by the appellees, two parents and their three minor children, for relief from the actions of the Harris County Child Welfare Unit of the State Department of Public Welfare (hereinafter referred to as "The Department") in the United States District Court for the Southern District of Texas, Houston

Division. The action challenged the constitutionality, both facially and as applied, of Chapters 11, 14, 15, 17, and 34, Title 2 of the Texas Family Code, and it sought declaratory, monetary, and injunctive relief against the Department's past and prospective interference with Appellees' family under authority of the challenged statutes. Pursuant to 28 U.S.C. §§ 2281 and 2284 a three-judge court was convened to consider the constitutional claims.

The Appellees filed their action in the District Court on April 19, 1976, after the Department had taken and kept custody of the family's three children for twenty-four days on the strength of two ex parte orders issued by the Harris County and Montgomery County juvenile courts. The District Court's initial action occurred on May 5, 1976, when it issued a preliminary injunction mandating the return of the three children. At that time, the children had been held by the Department for forty-two days; the Appellees had been frustrated in their attempt to modify the initial ex parte order authorizing seizure of the children (their motion was returned, unfiled); they had made two fruitless attempts at state habeas corpus; and they had not been served with any process on any suit initiated by the Department.

On May 21, 1976, the District Court, after hearing, entered a Temporary Restraining Order prohibiting any further state proceedings in Montgomery County, where the Department had filed a second suit affecting parent-child relations and had sought possession of one of the minor children by writ of attachment. When the three-judge court issued a preliminary injunction on June 7, 1976, there were two suits pending in state court in Montgomery County; state courts had issued three ex parte orders, and the Appellees had yet not had a hearing

in state court on anything other than the habeas corpus actions they initiated.

The State has taken this appeal from the District Court's decision that certain provisions of Title 2, Texas Family Code, were unconstitutional on their face as violative of due process and that several other provisions were unconstitutional as applied. The State bases its appeal to this Court on the grounds of abstention, justiciability and a lack of a case or controversy, and that the District Court's decision erred on the merits of Appellees due process. (Jurisdictional Statement pp. 10-11).

It is the position of the *Amicus* that the District Court acted properly under the doctrine of *Younger v. Harris*, 401 U.S. 705 (1971) in determining not to abstain from hearing Appellee family's constitutional claims and that those claims were properly adjudicated by the District Court.

I.

THE DOCTRINES OF EQUITABLE RESTRAINT AND COMITY DID NOT REQUIRE THE DISTRICT COURT TO ABSTAIN.

A. Neither Equitable Restraint Nor Comity Requires Abstention Where Great And Immediate Irreparable Injury Coincide With Bad Faith And Unavailability Of State Forum Redress Of Substantial Federal Constitutional Rights.

The Appellants' abstention argument contrives to square the facts of this case with several bald assertions about the availability of an effective state proceeding where the family could have raised its multiple constitutional

claims in order to show that the District Court failed to heed this Court's directions in *Younger v. Harris,* 401 U.S. 37 (1971); *Judice v. Vail,* 430 U.S. 327 (1977); and *Trainor v. Hernandez,* 431 U.S. 434 (1977). In order to avail itself of the doctrines of equitable restraint and comity, the Appellants argue (1) that the family's constitutional rights could have been resolved in one state proceeding (Jurisdictional Statement, p. 13); (2) that there were available State procedures for raising any constitutional claims (Jurisdictional Statement, p. 18); and (3) that there were no "extraordinary circumstances" sufficient to except this case from *Younger v. Harris, supra* and its progeny. (Jurisdictional Statement, pp. 15-16). Even a cursory analysis of the facts of this case show the State's argument as the contrivance it is.

The first tack of the Appellants' argument on abstention suggests that any and all constitutional claims could have been reserved to the time of trial, where they might be raised defensively. (Jurisdictional Statement, p. 18) Appellees may well have desired to try this avenue, but the fact remains that no state court hearing, even on temporary ex parte orders, was *scheduled* until May 21, 1976. (Jurisdictional Statement, p. 9) Assuming that a trial on the merits would have been possible, an adverse ruling on the parent-child status renders constitutional claims involving the seizure and detention of the children moot as a matter of state law. *In the Matter of R.__E.__W.__,* 545 S.W.2d 573, 575 (Tex. Civ. App. —Houston 1976, writ ref. n.r.e.).

In addition, Appellants acknowledge that the Appellee family was involved in two separate lawsuits involving children of the family, but maintain that this untoward development could have been resolved by res judicata

(Jurisdictional Statment, p. 13), thus facilitating the single proceeding resolution. However, the state-initiated lawsuits in Montgomery County were distinct in that the first involved all three children and the second involved but one. The appellees were thus forced to raise the constitutional claims in two separate lawsuits involving differing methods for seizure of the children involved in each (pre-order seizure in the first case, attachment in the second), and hope that collateral estoppel—not res judicata—would remain as a defense. For the District Court to abstain on this basis would likely be an abuse of discretion:

> There is a point, however, at which the possible benefits of abstention become too speculative to justify or require avoidance of the question presented.

Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471, 481 (1977).

Similarly, the Appellants' claim that suitable procedures existed to raise the constitutional issues rings hollow in light of the facts. The Appellee family pursued the following procedures: (1) a motion to modify under Section 17.06 of the Texas Family Code, (2) an application for writ of habeas corpus to the district court in Harris County, and (3) an application to the state appellate courts for a writ of habeas corpus. Their motion was returned unfiled, and they were twice denied habeas corpus relief on jurisdictional grounds. *Sims v. State Department of Public Welfare,* 438 F. Supp. 1177, 1184 (S.D. Tex. 1977).

Finally, the Appellants argue that there was no deliberate disregard of Appellees' constitutional rights, or

"bad faith." Although the State's actions are not apposite to the campaign of persecution chronicled in *Dombrowski v. Pfister,* 380 U.S. 479 (1965), discussed by this Court in *Younger, supra,* as an exceptional circumstance precluding comity oriented abstention, 401 U.S. at 53, the record in this case speaks to the State's disregard for the appellees' constitutional rights. The State secured three ex parte orders to obtain custody of the children of the family, and did not request citation nor seek to serve same on the Appellee parents after either of the first two orders were obtained. (Brief of Appellants, p. 6, 7). The State filed a suit affecting parent-child relations and sought the second ex parte order in Harris County after the state court there had found venue (as a result of Appellees' habeas corpus action) to lie in Montgomery County. (Appellants' Brief p. 7). When the District Court intervened to secure the return of the children after twenty days of illegal custody by the State, the State did not proceed with its first suit, then pending in Montgomery County, but proceeded to file yet another lawsuit in the same county and sought yet another ex parte order. (Appellants' Brief p. 8). The inescapable inference is that the State did not desire an adversary, and attempted service only after the federal court's intervention. (Appellants' Brief p. 8). Such has been Appellants' regard for the Appellees' constitutional rights.

Faced with this quagmire of litigation frustrating Appellees' attempts to raise their constitutional claims, the District Court found extraordinary circumstances militating against abstention. The District Court's characterization of the state court proceedings as "multifacited litigation" and "confusing", 438 F. Supp. at 1187, 1188, was charitable in view of the State's conduct in separating a

family for forty-two days. Even in enjoining the state proceedings, however, the District Court specifically drafted its order, and Appellants concede as much, to allow the State to continue to use some of its statutory procedures to remove children from immediate danger. (Jurisdictional Statement, p. 14) Rather than being indifferent to the principles of federalism, the District Court intervened judiciously to protect constitutional rights without unduly limiting the State's "sovereign capacity to protect its minor citizens." (Jurisdictional Statement, p. 20).

B. Authorities Cited By Appellant For Abstention Are Not Apposite To The Facts At Bar.

Appellants rely heavily for purposes of urging abstention on two recent decisions by this Court. *Judice v. Vail,* 430 U.S. 327 (1977) and *Trainor v. Hernandez,* 431 U.S. 434 (1977). In *Judice* this Court held that equitable restraint and comity required abstention where federal plaintiffs sought injunctive relief against enforcement of state contempt proceedings. The foundation for this decision was that the federal plaintiffs could have, but failed to, raise their constitutional claims in a single state proceeding; that they were not faced with further or repeated proceedings in state court; and that the state system afforded ample opportunity for them to be heard on their federal claims. In *Trainor* this Court held that abstention was required where federal plaintiffs sought declaratory and injunctive relief against the pre-judgment attachment of their bank accounts by the State of Illinois acting as a creditor. Unlike the parents in the case at bar, appellees in *Trainor* had not availed themselves of the meaningful forum that the State of Illinois had provided

to challenge the constitutionality of the state's actions. Also, unlike the final order entered below, the judgment of the District Court in *Trainor* totally prohibited the use of the state statutory scheme. Moreover, this Court found no harassment or bad faith on the part of the State of Illinois. Perhaps, the most important distinction between the case at bar and the authorities, including *Judice* and *Trainor,* cited by Appellants is that this case involves children, not bank accounts and not adults who have defied court orders. It is significant that Appellants have wholly failed to cite, discuss, or distinguish *Newton v. Burgin,* 363 F. Supp. 782, (W.D. N.C. 1973), *affirmed* 414 U.S. 1139 (1974). This case holds that the North Carolina child protection statutes allowing a five-day hiatus between the emergency removal of children from their parents' home and the parents' first day in court is unconstitutional. In so doing, the *Newton* District Court found that such a delay caused the parents

> a great and immediate, irreparable injury and that injury cannot be dissipated in the *defense* of the state civil proceeding.

Newton v. Burgin, supra, at 785. Any other result in the case at bar would not show due "sensitivity to the legitimate interests of both State and National governments." *Younger v. Harris, supra,* at 44.

II.

AN ARTICLE III CASE OR CONTROVERSY EXISTED BETWEEN APPELLEES AND APPELLANTS ON ALL ISSUES BEFORE THE COURT.

As an additional ground for undermining the decision of the Court below, Appellants assert that an Article III

case or controversy did not exist between Appellants and Appellees on the issues raised and decided by the District Court. We disagree.

Correctly noting that the "threshold inquiry" in a federal court is whether the plaintiff has standing to invoke the court's judicial powers", Appellants then proceed to conclude, based on misguided notions of standing, that the "statutes challenged by Appellees were not properly before the federal District Court." (Appellants Brief, pp. 25-26)

An analysis of Appellants arguments to support their conclusion reveals that their position is quite unsound and should be rejected.

It is now well established that, as a judicially developed procedural rule, standing finds its genesis in Article III of the Constitution, which limits the federal judicial power to actual "cases" or "controversies". *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 27, 37 (1976). The touchstone of any judicial analysis of an Article III standing question is whether the Plaintiff "has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin,* 422 U.S. 490, 498-499 (1975). The purpose of this inquiry is to assure "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions" *Baker v. Carr,* 369 U.S. 186, 204 (1962). Thus, in addressing the question of Article III standing this court has consistently viewed the fundamental question as being whether Plaintiffs have alleged "injury in fact" from the challenged actions; *Singleton v.*

Wulf, 428 U.S. 106, 112 (1976); or the actual threat of injury.[1] *Doe v. Bolton,* 410 U.S. 179, 188 (1973). On the record in this case it is clear that this query is to be answered affirmatively. Appellees have suffered, to the hands of the state, the following: (1) an unilateral seizure of their child without notice or prior judicial approval; (2) the issuance of two ex parte orders by the state district Court appointing the State Department of Human Resources as the temporary managing conservator, and one ex parte writ of attachment on their son; (3) the storing of information on Appellees in the Child Abuse Reporting System with the threat of dissemination, the veracity of which had not been tested through an adversarial process; (4) and a pending suit seeking that the rights and responsibilities of raising their child be placed in the hands of the state.[2] (See Appellees Brief, pp. 5-9) As a result of these actions by the State, Appellee, believing that the actual and threatened removal procedures utilized by the state, were in derogation of their constitutional rights, sought federal judicial intervention. To say that the Appellees had not alleged and suffered injury in fact simply belies reality. Nor can there be any question that challenged actions of the state were taken pursuant to and in accordance with the state statutes[3] under attack by Appellees.

1. For the purposes of standing the injury or actual threat thereof, may well be noneconomic in nature. See, *Data Processing Service v. Camp,* 397 U.S. 150, 154 (1970).

2. Where the burden of proof on the state would have been by a preponderance of the evidence. See § 11.15 of the Texas Family Code. In this regard, the existence of pending litigation renders it impossible for us to conceive of a greater threat of "putatively illegal action", *Warth v. Seldin, supra* at 499.

3. Although state law did not prohibit the appointment of an Attorney Ad Litem, at the ex parte hearing, it is nevertheless clear that Appellees, as the natural parents of the children, have standing to raise this issue on behalf of their children, See e.g. *Smith v. Organization of Foster Families,* 431 U.S. 816, 840. Of course, it goes without saying, that the minor plaintiffs who were not represented by an Ad Litem at the ex parte hearing have standing to raise this claim. *Smith v. Organization of Foster Families.* Id.

Thus, it is clear that Appellees have suffered "some threatened or actual injury resulting from the putatively illegal action . . ." *Linda R. S. v. Richard D.* 410 U.S. 614, 617 (1973); and, inasmuch as the injuries were a direct result of Appellants[4] efforts to intercede, Appellees were in a posture to have their injuries redressed by a favorable decision by the federal District Court. *Simon v. Eastern Kentucky Welfare Rights Organization, supra* at 38. For these reasons then, Amicus submits that on Article III a case or controversy existed between Appellants and Appellees on all of the issues raised and decided by the court below.

Any further consideration of the question of standing would be a prudential matter, with the inquiry turning to whether or not plaintiffs are the "proper proponents of the particular legal rights on which they base their suit." *Singleton v. Wulf,* 428 U.S. at 112. Considering the rather expansive scope of injuries suffered by Appellees it is difficult, if not impossible, to conceive of a more appropriate advocate than they. Unlike the plaintiffs in *Singleton v. Wulf, supra* or in *Simon v. Eastern Kentucky Welfare Rights Organization, supra* Appellees are not seeking to base their legal position on the rights

4. Among the Appellants is the Director of the Harris County Child Welfare Unit of the State Department of Public Welfare, who is the chief administrative officer of that local agency. (A-12). As such, it was this Appellant who was responsible for the decision to initiate the conservatorship proceedings against Appellees. (Appellants' Brief p. 6)

of third parties, but instead build the foundation of their claim on their own rights to privacy, integrity of the family unit, and due process of law.[5] *See e.g. Smith v. Organization of Foster Families.* 413 U.S. 816 (1977) Accordingly, those prudential considerations usually attendant to cases where even though the plaintiffs have sufficiently established injury in fact, their legal arguments are based upon the rights of others,[6] *See e.g. Craig v. Boren* 429 U.S. 190 (1976), are simply nonexistent here. It is on this basis that, Amicus submits that not only do Appellees have Article III standing but that they are the most appropriate proponents of the particular "legal rights on which they base their suit." *Singleton v. Wulf, supra,* 428 U.S. at 112.

Finally, we note that among Appellants' contentions regarding the lack of an Article III case or controversy is that they are the wrong Defendants for Plaintiffs to sue, and therefore the requisite controversy does not exist, since they do not have the power to "perform the function desired as relief." (Appellants Brief, p. 32). This grossly misperceives the nature of the controversy giving rise to the ultimate relief granted by the District Court—the injunction against further application and enforcement of the challenged statutes. See e.g., *Dombrowski v. Pfister,* 380 U.S. 479, 497 (1965). The ve-

5. Including those of the minor plaintiffs, Sabrina Sims, Paul Sims, and Shawana Sims.

6. In *Singleton v. Wulf,* this Court explained the rationale behind prudential considerations as follows: "First the courts should not adjudicate such rights unnecessarily, and it may be in fact the holders of these rights do not wish to assert them. . . . Second, third parties themselves usually will be the best proponent of their own rights." *Singleton v. Wulf,* 428 U.S. 106, 133. As previously stated, in this case, neither consideration is germane to the issue.

hicle by which the Court reaches its conclusion to enjoin the state from further proceedings is, of course, that the removal procedures set forth in the statute and utilized by Appellants here does not provide constitutionally adequate safeguards for a threatened family, such as Appellees. In this regard, Appellants reliance on *Rizzo v. Goode,* 423 U.S. 362 (1976) is completely misplaced. In *Rizzo* the cornerstone of this Court's finding that the individual plaintiffs lacked standing was, that the threat of injury in the future was not from Defendants, but instead from a minority of policemen who operated under misguided notions of the Department's disciplinary procedure. Unlike the case sub judice, there was *no showing* that these actions were pursuant to any regulations or formal policy regarding such conduct. *Rizzo, supra* 423 U.S. at 371-373.

Here, the causation is not attenuated but is linked to the action of Appellants who, by law, have the direct responsibility of carrying out and enforcing the statutes under attack in this litigation (A-11-A-23). *See, e.g. Wooley v. Maynard,* 430 U.S. 705 (1977). *Accord, Monell v. Department of Social Services,* ____U.S.____, 54 L.Ed.2d 6111 (1978). The order of District Court, did not, as the State would have this court believe, direct them to perform any function other than ceasing to enforce the facially constitutionally deficient statutes. See, *Dombrowski v. Pfister,* 380 U.S. at 497. Inasmuch as this was clearly within their power to do, the state's argument to the contrary is without merit.

For, these reasons amicus submits that all Appellants arguments relating to an Article III case or controversy should be rejected.

III.

THE CHALLENGED PORTIONS OF THE CHILD ABUSE STATUTES ARE UNCONSTITUTIONAL.

Arguing that the District Court exceeded the bounds of established due process standards, the Appellants attack the District Court's holding that the failure to secure judicial authorization prior to or on the very day of the extra judicial seizure is violative of fundamental notions of due process. Amicus submits that the position taken by Appellants on this issue contravenes firmly established decisions of this court.

Recognizing that the "custody, care and nuture of the child reside first in the parents, whose primary function and freedom include preparation of obligations the state can neither supply nor hinder." *Prince v. Massachusetts,* 321 U.S. 156, 166 (1944); this court has accorded both substantive and procedural protections to certain areas of family life, especially where the state is seeking to interfere with the parent-child relationship. *See, e.g., Wisconsin v. Yoder,* 406 U.S. 205 (1972) and *Stanley v. Illinois,* 405 U.S. 645 (1972). For this reason, this Court has been zealous in its scrutiny of state interference with the parent-child relationship, *Stanley v. Illinois, supra,* inasmuch as the "liberty interest in family privacy has as its source, and its contours are ordinarily to be sought, . . . in intrinsic human rights, as they have been understood in 'this nation's history' ". *Smith v. Organization of Foster Families, supra,* 431 U.S. at 845. Although the parties are in agreement that these fundamental propositions mandate that the state provide some procedural protections to the threatened family unit, they are in substantial disagreement as to what process is

due. Basing their arguments on notions of administrative burden and misguided views of the balancing of the parties' interest, the state attacks the District Court's finding that due process requires judicial approval of the State's action on the very day in which it takes place (Appellants' Brief pp. 40-41). We disagree.

It is now beyond cavil that due process is a flexible concept which "calls for such procedural protections as particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1971). In *Matthews v. Eldrigge,* 424 U.S. 319 (1976) this court outlined the contours of the considerations in balancing the interests of the adverse parties:

> First, the private interest that will be affected . . . second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the government's interest, including the function involved in fiscal and administrative burdens that additional or substitute procedural requirements would entail.
>
> 431 U.S. at 848-849

The private interest affected is the right to family privacy and to the integrity and preservation of the family unit, an interest which this court has previously described as having its source "not in state law, but in intrinsic human rights." *Smith v. Organization of Foster Families,* 431 U.S. at 845. It is an interest which comes to this court "with a momentum for respect lacking when appeal was made to liberties which derive merely from shifting economic arrangements." *Stanley v. Illinois, supra,* 405 U.S. at 651. Quite clearly then, the interest is a substantial, if not, a fundamental one.

Turning to the second inquiry, Amicus submits that absent the procedures mandated by the District Court the risk of an erroneous deprivation is substantial. Reduced to its simplest form the allowance of the extra judicial seizure of the child in an "emergency" situation places in the hands of the state, the absolute unfettered discretion in determining the sufficiency of the need to deprive the family unit of its fundamental liberty interest. It is quite clear that rudimentary notions of due process dictate that before one can be deprived of a fundamental interest the grounds for the deprivation must be reviewed by judicial authority. *Fuentes v. Shevin,* 407 U.S. 67 (1972). Accord, *Mitchell v. W. T. Grant Co.,* 416 U.S. 600 (1974). We believe absent this minimal requirement, the risk of a wrongful deprivation of this fundamental right is heightened to a constitutionally intolerable level. The minimal protections required by the District Court in this case, at the very least guarantee the legal and factual sufficiency of the State's basis for the seizure,[7] eschewing procedure by presumption, thus protecting the "fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize government officials . . ." *Stanley v. Illinois, supra,* 405 U.S. at 656.

Amicus does not question the State's interest in protecting children from neglectful or abusive parents but

7. The only basis upon which an extra judicial seizure may take place is stated in § 17.01 of the Texas Family Code, which provides in pertinent part, that the State may take possession of the child "to protect him from an immediate danger to his health or physical safety . . .". § 17.01 of the Texas Family Code. What constitutes "an immediate danger to his health or physical safety" may be subject to varied interpretations depending upon the individual welfare worker assigned to the case.

we think that due process requires that the State employ those procedures which do not "needlessly risk[s] running roughshod over the important interest of both parent and child." *Stanley v. Illinois, supra,* 405 U.S. at 657. To the extent that § 17.01 of the Texas Family Code did not require that an independent judicial authority review both the legal and factual sufficiency of the State's grounds for intrustion into the family unit, either prior to or on the very day of the seizure, it contravenes this concept and therefore cannot stand. The District Court's minimal protections of the rights of both the parents and the children should be affirmed. Cf., *Smith v. Organization of Foster Families, supra,* 431 U.S. at 850.

Finally, this Court will inquire into the administrative burdens that the additional procedures would entail. The only argument which the State makes in this regard is simply the difficulty in getting to a judge to present their request for an ex parte order. We simply cannot conceive that this "burden" outweighs the possibility of the harmful consequences which could result from a precipitious and improvident decision to remove the child from the family unit. In the area of property interests, an area which we submit is far less fundamental than the one involved here, this Court has previously found as constitutionally acceptable procedures which allow review of the basis for the ex parte seizure, by independent judicial authority, prior to the actual deprivation. See, *Mitchell v. W. T. Grant Co., supra,* 416 U.S. at 617. At the very least, due process requires that a similar procedure be utilized here, and the State's claim that their interest in protecting children from "an immediate danger" outweighs the family interest in pro-

tecting against an erroneous deprivation should be completely rejected.[8]

IV.

CONCLUSION

For the foregoing reasons, this *Amicus* respectfully submits that the opinion of the three-judge District Court below should be affirmed in all respects.

Respectfully submitted,

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8. We note, that the "burden" on the State is no different than that placed on the general bar when faced with extreme situations where they are in need of a restraining order in order to protect either the economic or non-economic interest of their client. Of course, this would include obtaining restraining orders in domestic relations cases where the attorney is seeking to protect his client from threats of physical abuse by the spouse.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief Amicus Curiae of East Texas Legal Services, Inc., has been forwarded to all counsel of record in this cause by depositing the same in the United States mail, postage prepaid on this 12th day of January, 1979.

ROBERT B. O'KEEFE
Attorney for East Texas Legal Services, Inc.